QUESTIONS PRESENTED FOR REVIEW

1. Following this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did the state trial court properly admit in evidence the first statement obtained from Respondent after law enforcement authorities informed him, that although he had the right to counsel prior to the custodial interrogation: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court"?

2. Did the Court of Appeals properly remand this case to the District Court for determination of whether Respondent's second statement was obtained after a voluntary waiver of his right to counsel when there is no record of the state court suppression hearing properly before the Court and when the second warnings were themselves inadequate and failed to correct the statement in the first warnings that counsel would only be provided if Respondent's case went to court?

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STATEMENT OF THE CASE

In the late night hours of May 16, 1982 the Respondent, Gary James Eagan, telephoned the Chicago Police Department to report that he had seen a dead nude woman (SCR[1] 205). Respondent took the Chicago police to a wooded area near Lake Michigan just over the Illinois state line in Indiana. There the police found a young woman shouting for assistance. As the police assisted the woman, they heard her ask Respondent: "Why did you stab me?" (SCR 207).

Respondent informed police that he had been attacked earlier in the evening by several persons who later abducted the young woman (SCR 163-164, 227). When the Hammond, Indiana police arrived they requested that Respondent go with them to the Robertsdale Station (J.A. 103) at which time the officers noticed what appeared to be dried blood on the outside of the Respondent's automobile. Respondent indicated that the blood was the result of a friend's cut hand (SCR 165). Respondent gave the police permission to take samples of the blood from his car (SCR 166, 228). The police determined that there were discrepancies in Respondent's story which included observations that would have been physically impossible for Respondent to make (SCR 176). At that point Respondent appeared distraught, tired, and glassy eyed (J.A. 100). The Hammond police asked Respondent to waive his constitutional rights and provide a statement. The specific waiver of rights, which Respondent signed, read as follows (J.A. 133):

YOUR RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain

[1] State Court Record

> silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer (emphasis added).

In this initial statement (SCR 236-239; J.A. 134-137), given at 11:16 a.m. on May 17, 1982, Respondent indicated that he picked up the young woman in Chicago and drove around until they went to the wooded area where they engaged in sexual relations. They then drove to "Cal Park" where the woman got into a van with several men. When the van returned, the woman was not present, so Respondent went to the wooded area but was unable to find her. Respondent then called the Chicago police. Respondent further indicated in the statement that the blood on the seat of the driver's side of the vehicle came from a friend named "Jim" who had cut his finger the week before.

The police believed that this statement was not consistent with the physical terrain of the area (SCR 241). Respondent was held overnight in custody "for probable cause" (J.A. 103). After the police interviewed the victim in the hospital, they again interviewed Respondent. This interview took place at 4:21 p.m. on May 18, 1982, approximately 29 hours after the initial statement. Before giving this statement, Respondent signed a waiver from (J.A. 141-142) which included the following description of rights:

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
>
> 5. That if I cannot hire an attorney, one will be provided for me.

After signing the waiver, Respondent gave a statement in which he indicated (SCR 250-254) that he, two friends, and the woman went to the area near the beach. Each of the men had sexual relations with the woman, but a struggle ensued when the woman requested payment in return for sex. Respondent admitted hitting the woman on the head with a brick and then stabbing her (SCR 252-253). After giving this statement, Respondent returned to the crime scene with the police and assisted them in finding a knife, sheath, towel, and rag (SCR 255-256).

On May 19, 1982 an information was filed in the Superior Court of Lake County, Indiana charging Respondent with rape and attempted murder. Following the denial of Respondent's motion to suppress evidence (SCR 38-39), the case was tried to a jury in that court. In addition to the introduction of Respondent's statements, the primary evi-

dence against him was the testimony of the victim, Kay Sandra Williams. Ms. Williams testified that Respondent and two other men forced her to engage in sexual relations (SCR 116). The prosecutrix identified Respondent as the person who then hit her with a brick and stabbed her (SCR 117-118).

The primary witness called by Respondent was his sister who indicated that shortly after the stabbing Respondent arrived at her home. Respondent told her that he had taken drugs and had drunk whiskey and that "they were all stoned to begin with" (SCR 309). Respondent appeared to be "wrecked" and "hyperactive" (SCR 311). The Respondent did not testify at trial.

Based on this evidence, the jury found Respondent not guilty of rape, but guilty of attempted murder (SCR 78-79). Upon conviction, Respondent was sentenced to 35 years imprisonment.

The Indiana Supreme Court affirmed Respondent's conviction, *Eagan* v. *State*, 480 N.E.2d 946 (Ind. 1985), Justice De Bruler, dissenting (J.A. 82-94). On February 6, 1986 Respondent commenced this habeas corpus action in the United States District Court for the Northern District of Indiana pursuant to 28 U.S.C. § 2254 (J.A. 64-81). Respondent asserted that his federal constitutional rights were violated by the admission of the statements. The District Court, Hon. Allen Sharp, Chief Judge, presiding, denied the writ on June 26, 1986 (J.A. 49-53), but issued a Certificate of Probable Cause on July 14, 1986.

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, and that Court appointed counsel. On March 22, 1988 a divided panel of the Seventh Circuit reversed the order of the District Court (J.A. 3-48). The majority, following the Seventh

Circuit's earlier decisions in *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248 (7th Cir. 1972) and *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298 (7th Cir. 1976), concluded that the words used in the first *Miranda* warning suggest "erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This language further implies that if the accused does not 'go to court,' i.e. the government does not file charges, the accused is not entitled to an attorney at all," (J.A. 8). The Court remanded the case for a determination of whether Respondent's second statement was made after a knowing and voluntary waiver of his constitutional rights, as the *Miranda* warnings afforded Respondent prior to his second statement did not explicitly correct the misinformation in the first admonitions, *Eagan* v. *Duckworth*, 843 F.2d 1554 (7th Cir. 1988).

On May 24, 1988 the Seventh Circuit denied the Warden's Petition for Rehearing *En Banc*, four judges dissenting (J.A. 1-2). The Warden then filed this certiorari petition which was granted by the Court on October 11, 1988, 109 S.Ct. 218. On October 31, 1988 the Court appointed the undersigned attorney to represent Respondent before this Court, 109 S.Ct. 301.

Respondent remains confined at the Indiana State Prison, Michigan City, serving this sentence.

Other facts necessary to a determination of this case will be stated in the body of this Brief.

SUMMARY OF ARGUMENT

1. A. The United States, as *Amicus Curiae*, suggests that Respondent was not "in custody" at the time of

his first interrogation. As this issue has not been raised by the State in any previous court and was not raised in the certiorari petition, the "custody" question is not properly before the Court. Nevertheless, the facts here show that Eagan was in custody at the time of his first interrogation.

B. 1. This Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires that an indigent suspect be informed of his right to consult with assigned counsel before and during a custodial interrogation. Here the warnings given Respondent prior to his first statement violated *Miranda* because he was informed that he could only have provided counsel if his case ultimately went to court.

2. a. The *Miranda* warnings given Eagan prior to his first statement indicated that he had the right to appointed counsel "if and when you go to court." Lower courts have disagreed on the propriety of the "if and when" warnings, with most courts holding these specific warnings improper because they state that counsel can not be provided at the time of the interrogation. Courts have found the "if and when" warnings "pretzel-like," ambiguous, and contradictory. Those courts which have upheld these warnings have seriously overestimated the intellectual sophistication and comprehension of the average suspect, when empirical data demonstrate that many suspects do not understand correct *Miranda* warnings.

b. This Court's decision in *California* v. *Prysock*, 453 U.S. 355 (1981) (*per curiam*) stands for the proposition that a *Miranda* warning which links the right to appointed counsel to a future point after the interrogation is invalid. Here the warnings given Eagan prior to his first statement did exactly that—linked his right to free counsel to a point after the interrogation, his appearance in

court. Analysis of the cases cited with approval in *Prysock* and cases interpreting this Court's decision all indicate that the "if and when you go to court" admonitions violate *Miranda*.

C. It is entirely proper under *Miranda* for a jurisdiction to require a court to appoint counsel to represent a suspect at a custodial interrogation. Other states have adopted various procedures to supply counsel at custodial interrogations. These procedures include requiring law enforcement authorities to contact the court or public defender, allowing the suspect to make direct contact with a public defender, and establishing lists of private attorneys willing to represent indigent suspects at custodial interrogations. The problem here is that the State of Indiana has adopted *none* of these procedures and does not provide for the assignment of counsel prior to court appearance by any method. This then results in police telling suspects that although they have the right to consult with counsel before and during the interrogation "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." This statement, even if it correctly reflects Indiana law, denies a suspect his right to have an attorney at the time of the questioning, before court appearance.

II. A. The only relief granted Respondent by the Court of Appeals was to remand this case to the District Court with directions to determine whether Eagan's second statement was made after a knowing and understanding waiver of his right to counsel. This relief is appropriate because the transcript of the suppression hearing, which is now apparently available, was not prepared until months after the oral argument in the Seventh Circuit. This transcript was never considered by the Indiana Supreme Court or the District Court and was not made

part of the record on appeal in the Seventh Circuit. Remand is appropriate so the District Court can consider this transcript in conjunction with all other evidence regarding the facts and circumstances of the second confession.

B. The second warnings given Respondent also failed to comply with *Miranda* as they informed him that he had "the right to consult with an attorney *of my own choice* before saying anything." Although later in the same warnings Respondent was informed that if he "cannot hire an attorney, one will be provided" for him, the structure and content of admonitions do not clearly inform a suspect of his right to assigned counsel before and during the questioning.

C. This case is distinguishable from *Oregon* v. *Elstad*, 470 U.S. 298 (1985) because here the second warnings were not complete, clear, or comprehensive. In addition, when one considers the two sets of warnings given to Respondent 29 hours apart, it is obvious that Eagan was never properly informed of his right to have counsel at the interrogation. He was first told he could not have appointed counsel at the interrogation, and the second instructions, themselves ambiguous, failed to correct the misstatement regarding the right.

Under all of the circumstances of this case the modest relief granted by the Seventh Circuit, remand to the District Court, should be affirmed.

ARGUMENT

I RESPONDENT'S FIRST STATEMENT WAS INADMISSIBLE BECAUSE IT WAS OBTAINED AFTER HE WAS GIVEN A DEFECTIVE *MIRANDA* WARNING WHICH CONDITIONED HIS RIGHT TO COUNSEL ON APPEARANCE IN COURT.

A. The Question Of Whether Respondent Was "In Custody" At The Time Of His First Statement Is Not Properly Before The Court And, In Any Event, Respondent Was "In Custody" Within The Meaning Of *Miranda* When He Gave The First Statement.

1. The "Custody" Question Is Not Properly Before The Court.

At footnote 7 appearing at pages 10 and 11 of his *Amicus* Brief, the Solicitor General suggests that Eagan was not "in custody" at the time he gave his first statement, and thus the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) do not apply at all. The question of custody has never been raised by the State of Indiana in any court, state or federal, and thus this issue should not be considered by this Court, *E.E.O.C.* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Normal practice . . . is to refrain from addressing issues not raised in the court of appeals."); *Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977), even though such issue is raised by *amicus* in this Court, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, fn. 2 (1981). Moreover, the issue was not raised in the certiorari petition, and thus is not properly before the Court, Supreme Court Rule 34.1(a), *F.D. Rich Co.* v. *United States, Industrial Lumber Co.*, 417 U.S. 116, 121, fn. 6 (1974); *Namet* v. *United States*, 373 U.S. 179, 190 (1963). When an issue has not been raised in the lower courts, is not raised in the certiorari petition, and is objected to by respondent, it is inappropriate for this Court to consider such question,

Springfield, Mass. v. *Kibbe*, 480 U.S. 257 (1986) (*per curiam*).

This is not one of those "exceptional cases" in which the Court should decide an issue neither pressed nor passed upon by the courts below, *see*, *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). This is particularly true when reviewing a state criminal conviction in which issues of comity dictate that this Court not reach issues never asserted in state court, *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983). While this case technically comes to this Court from the United States Court of Appeals which reviewed the state conviction on habeas corpus, the considerations governing review of a state court conviction are the same as in *Gates*. Those considerations include: (1) the state court record is not well developed on the point; (2) the state courts should be afforded the opportunity to first consider the legality of state officers' conduct; and (3) the state courts should be allowed to determine whether the rights accorded a criminal defendant should be broader under independent state law than under federal law[2], 462 U.S. at 221-222.

This case does not present a case of such "plain error" as to warrant the unusual step of deciding an issue not raised in the lower courts, not presented in the certiorari petition, nor urged by either party, or even *amicus*, *see generally*, Robertson, *Jurisdiction of the Supreme Court*

[2] Consideration of the "custody" question here is particularly inappropriate in view of the Indiana appellate court decisions considering the "custody" question in the context of these precise warnings and under circumstances closely analogous to the factual circumstances in the case at bar, *see*, *Dickerson* v. *State*, 257 Ind. 562, 276 N.E.2d 845, 847-848 (1972) (same *Miranda* warnings); *Johnson* v. *State*, 484 N.E.2d 49, 51 (Ind. App. 1985) (similar factual context.)

of the United States, § 418, pp. 835-840 (1951); Stern, Gressman, Shapiro, *Supreme Court Practice*, § 6.26, pp. 363-368 (6th ed. 1986). Generally this Court has limited its discretion to notice a "plain error" to those unusual circumstances where the errors "seriously affect the fairness, integrity, or public reputation of public proceedings," *Connor* v. *Finch*, 431 U.S. 407, 421, fn. 19 (1977).

A review of the decisions of the Indiana Supreme Court, United States District Court, and Seventh Circuit all reveal that "custody" was assumed for the purposes of this case. This assumption is not questioned in this Court by Petitioner. While this Court may have the discretion to consider the question of custody, the more established principle is to "take the case as it comes to" the Court and review the questions decided in the state courts, decided in the courts below, raised in the petition, and briefed by both the parties and the Solicitor General, *United States* v. *Leon*, 468 U.S. 897, 905 (1984). There is no occasion presented by this case to consider whether Eagan was "in custody" at the time of his first statement.

2. Respondent Was Clearly "In Custody" At The Time Of His First Statement.

Miranda applies only to custodial interrogations, 384 U.S. at 444. Respondent submits that, should this Court consider the "custody" issue, the record clearly demonstrates that his first statement was the result of a custodial interrogation. This Court has made clear that the question of "custody" is objective: Was the suspect actually in custody, *Beckwith* v. *United States*, 425 U.S. 341, 347 (1976); *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*). In order to constitute "custody", the restraint on a suspect's freedom must be to the degree

associated with a formal arrest, *Minnesota* v. *Murphy*, 465 U.S. 420, 430 (1984). Thus if the suspect was actually allowed to leave following the interrogation, he was not "in custody," regardless of the circumstances of the interview, *California* v. *Beheler*, 463 U.S. 1121 (1983) (*per curiam*).

In the instant case the preprinted waiver form signed by Respondent prior to his first statement (J.A. 133) stated that he was not under arrest and that he could leave the officers' office if he wished. This boilerplate language aside, it is apparent from the facts of this case that Eagan was indeed "in custody" at the time of this first statement.

The Hammond police first had contact with Respondent at the crime scene at approximately 8:00 a.m. on May 17, 1982 (J.A. 101). From that point on Respondent was with police officers at all times until he was formally charged with these offenses. His first statement was given at 11:14 a.m. on the 17th, while his second statement was given the following afternoon, after Eagan had been held in custody overnight. At the time Eagan first had contact with the Hammond police, the authorities already knew that the victim of the crime, when found by Chicago police, had asked Eagan: "Why did you stab me?" (SCR 207). By this time the police were also aware of certain discrepancies in the story Respondent originally told them, which they believed inconsistent with established facts (SCR 176). The Hammond police then asked Eagan if he would come to the police station so they could obtain a statement (J.A. 103). The officers transported Respondent from the crime scene to the station (J.A. 103). Before taking the first statement, the police discovered blood stains on and in Respondent's car and asked Eagan's permission to take samples (SCR 166, 228). It was at this

point that Eagan was given the first set of warnings and gave an exculpatory statement.

Lower courts have struggled to apply this Court's decisions regarding custody in the *Miranda* context, *see generally*, Nissman, Hagen, and Brooks, *Law of Confessions*, § 4:10, pp. 98-102 (1985). After *Berkemer* v. *McCarthy*, 468 U.S. 420 (1984), however, it is clear that the proper question is not whether a reasonable person would believe he was not free to leave, but whether such a person would believe he was in police custody of the degree associated with formal arrest. In answering this question, courts will look to the location of the interrogation, whether the suspect was confronted by several officers instead of just one, whether the interrogation took place in front of the suspect's friends or other third parties, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation, 1 W. LaFave & J. Israel, *Criminal Procedure*, § 6.6, pp. 494-499 (1984) (cases collected), *United States* v. *Streifel*, 781 F.2d 953, 961 (1st Cir. 1986).

Applying these criteria to the instant case, we find that the interrogation occurred at the Robertsdale police station, after Respondent had been transported by the police from the crime scene to the station house. The interrogation was conducted by two officers, with only the Respondent present. Additionally, and most importantly, Eagan was actually in custody at all times after his initial contact with the police. He was transported by the Hammond police to the police station in the early morning hours of May 17, 1982; Eagan was interrogated by police for between two and three hours before he gave his first statement; he was confined all day on May 17th, held overnight, and he was confined until the late afternoon of May 18th, at which point he was again interrogated.

Respondent submits that these facts belie any assertion that he was not in custody when he gave the first statement.

It is significant that the Indiana Supreme Court, reviewing a statement obtained after the accused signed *exactly the same waiver as involved in this case*, determined that the suspect was "in custody" for *Miranda* purposes even though he had come to the police station voluntarily, on unrelated business, at which time the police initiated the interrogation, *Dickerson* v. *State*, 276 N.E.2d at 847-848. A more recent Indiana decision involved a defendant who voluntarily went to the police station at the request of the police after he was identified by the victim of child molestation. He too was questioned in a police interview room at the police station. Under these circumstances, following *Dickerson*, the Indiana Appellate Court found that the defendant was actually "in custody" at the time of the interrogation regardless of the voluntary nature of his arrival, *Johnson* v. *State*, 484 N.E.2d at 51.

This is consistent with the decision of the New Jersey Superior Court (Appellate Division) in which a defendant who voluntarily submitted to an interrogation and was told that he was not under arrest and could terminate the interview at any time and leave was still "in custody" within the meaning of *Miranda*, *State* v. *Micheliche*, 220 N.J. Super. 532, 533 A.2d 41, 42-43 (1987). The New Jersey Court reasoned that regardless of what the defendant was told, the facts of the case indicated that the suspect was actually "in custody" and was not free to leave. At the time of the interrogation the police knew that Micheliche had been implicated in the murder, was present at the time of the crime, and had lied about various matters.

The result here is the same. When the police took Eagan to the Robertsdale station they already knew that the victim had identified him as her assailant and that his initial statement was inconsistent with known facts. By the time the interrogation began the police knew that there were blood stains in and on Eagan's automobile. After the interrogation—even though Respondent gave an *exculpatory* statement—Eagan was held in custody. Under all of the facts, Respondent clearly was "in custody" at the time of the initial interrogation, and the authorities were therefore obligated to comply with the dictates of *Miranda*.

B. The Warnings Given Respondent Prior To His First Statement Violated *Miranda* By Conditioning His Right To Counsel On His Appearance In Court After Police Interrogation.

1. *Miranda* Explicitly Requires That Counsel Be Provided An Indigent Suspect Or Be Properly Waived Prior To A Custodial Interrogation.

The problem with the admonitions given to Eagan prior to his first statement is that after the police first told him that he had the right to counsel prior to and during the interrogation and that he had such right even if he could not afford to hire an attorney, he was then told: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." (J.A. 134). The majority of the Seventh Circuit found the warning improper because:

> The "if and when" language limits and conditions an indigent's right to counsel on a future event. The warning suggests erroneously that only those accused who can afford an attorney have the right to have one present before answering any questions; those who are not so fortunate must wait. This lan-

guage further implies that if the accused does not "go to court", i.e. the government does not file charges, the accused is not entitled to an attorney at all.

Thus, this warning is constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation.

(J.A. 8).

Respondent submits that this analysis is correct and the judgment of the Court of Appeals should be affirmed.

There is no ambiguity in Chief Justice Warren's opinion for the Court in *Miranda* on an indigent's right to have counsel present at a custodial interrogation. After delineating the Fifth Amendment right to counsel established in *Miranda*, the Chief Justice turned to the implementation of this right for persons who could not afford to retain an attorney. The Court concluded that the denial of counsel to an indigent person at a custodial interrogation would be unsupportable and illogical. The Chief Justice then considered the warnings that were to precede a custodial interrogation of a person who could not afford a lawyer:

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.

384 U.S. 473 (footnote omitted).

Respondent submits that the warnings provided him prior to his first statement did not comply with this specific directive of *Miranda*. The warnings informed Respondent that he could not actually have an attorney at the time of the interrogation, but that he had to wait until his case came to court. If his case did not get to court; he could not get an attorney. These warnings were not the type of clear statement of rights anticipated by this Court in *Miranda*.

Petitioner and the Government of the United States advocate a direct and substantial repudiation of the rights specifically established in *Miranda* in favor of a rule that if the admonitions "touch all points required by the *Miranda* decision" (*Amicus Brief*, p. 10), the warnings are valid regardless, apparently, of how ambiguous, inconsistent, and unclear the instructions are or whether additional information is added to the warnings which essentially negates the rights to which the suspect is entitled. That is not what this Court required in *Miranda* itself. The Court held that it was not enough to tell the suspect that he could obtain appointed counsel when his case went to court or that he could have a lawyer present if he had, or could retain, one. Certainly no basis has been shown in this record or in the briefs of counsel to warrant reconsideration of this basic principle which has existed for more than twenty years.

While Petitioner denigrates the judgment of the Court of Appeals as "formalistic" and "hyper-technical" *Brief for Petitioner*, at i), the fact of the matter is that in *Miranda* the Court was emphatic in securing the right to pre-

interrogation counsel for indigents and requiring warnings which adequately inform the suspect of this right. Although it is true that this Court has made clear that no precise formulation of the *Miranda* warnings is required, *California* v. *Prysock*, 453 U.S. 355, 359 (1981) (*per curiam*), the warnings given here are improper because they misstate the suspect's right to counsel under *Miranda* and connect the right to appointed counsel to an event after the interrogation. For this reason the instant admonitions were invalid, and Respondent's first statement should have been suppressed.

2. Although Lower Courts Have Disagreed On The Validity Of The "If And When" *Miranda* Warnings, The Majority Of The Courts Have Held Such Admonitions Invalid, And Such A Result Is Clearly Required After This Court's Decision In *Prysock*.

a. Prior To *Prysock* The Majority Of Courts Held The "If And When" *Miranda* Warnings To Be Invalid.

Prior to obtaining Respondent's first statement, the Hammond police informed him that he had the right to speak to a lawyer for advice before the interrogation, to have counsel present during the questioning, and that he had "this right to the advice and presence of a lawyer even if [he] cannot afford to hire one." The advice of rights continued: "We have no way of giving you a lawyer, but one will be appointed, if you wish, if and when you go to court." Thus the primary questions in this case are whether the latter language linked Respondent's right to counsel to a future event occurring after the interrogation thus violating *Miranda*, as construed by this Court in *Prysock*, 453 U.S. at 360, and whether the information imparted to Respondent regarding his right to counsel was so ambiguous as to constitute a denial of that right.

This precise question has been the subject of extensive litigation, and the courts have split on the propriety of such warnings. The majority of courts which have considered the validity of similar *Miranda* warnings have found them to be fatally defective because they condition the suspect's right to counsel on his appearance in court and because such warnings are ambiguous: first explaining a present right to counsel, but then informing the suspect that counsel can not actually be provided until a later time. Thus the majority of state appellate courts have found such warnings to violate *Miranda*, *Brown* v. *State*, 396 S.2d 137 (Ala.App. 1981); *State* v. *Cassell*, 602 P.2d 410 (Alaska, 1979); *Moore* v. *State*, 251 Ark. 436, 472 S.W.2d 940 (1971); *People* v. *Clark*, 2 Cal.App.3d 510, 82 Cal.Rptr. 393 (1969); *Brooks* v. *State*, 229 A.2d 833 (Del. 1979); *Cribbs* v. *State*, 378 S.2d 316 (Fla.App. 1980); *State* v. *Grierson*, 95 Ida. 155, 504 P.2d 1204 (1972) (dictum); *State* v. *Carpenter*, 211 Kan. 234, 505 P.2d 753 (1973); *State* v. *McBroom*, 394 N.W.2d 806 (Minn.App. 1986); *State* v. *Dess*, 184 Mont. 116, 602 P.2d 142 (1979); *State* v. *Robbins*, 4 N.C.App. 463, 167 S.E.2d 16 (1969); *Commonwealth* v. *Johnson*, 484 Pa. 349, 399 A.2d 111 (1979); *State* v. *Creach*, 77 Wash.2d 194, 461 P.2d 329 (1969).

Fewer states have found such admonitions to be valid, *State* v. *Mumbaugh*, 107 Ariz. 589, 491 P.2d 443 (1971); *State* v. *Maluia*, 56 Hawaii 428, 539 P.2d 1200 (1975); *People* v. *Williams*, 131 Ill.App.3d 149, 264 N.E.2d 901 (1970); *Emler* v. *State*, 259 Ind. 241, 286 N.E.2d 408 (1972); *State* v. *Sterling*, 377 S.2d 58 (La. 1979); *People* v. *Campbell*, 216 Mich.App. 196, 182 N.W.2d 4 (1970), *cert. denied*, 400 U.S. 945 (1971); *Harrell* v. *State*, 357 S.2d 643 (Miss. 1978); *People* v. *Swift*, 32 A.D.2d 183, 300 N.Y.S.2d 639 (1969), *cert. denied*, 396 U.S. 1018 (1970); *Arnold* v. *State*, 548 P.2d 659 (Okla. Crim. 1976); *Grennier* v. *State*, 70 Wis.2d 204, 213-215, 234 N.W.2d 316 (1975).

The circuits are also split on the propriety of these admonitions. In the Seventh Circuit, in which this case arises, the law was settled in *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248 (7th Cir. 1972), wherein the Court of Appeals found the instruction was "not an 'effective and express explanation'" of the suspect's *Miranda* rights and was "equivocal and ambiguous," 467 F.2d at 1250. In *United States ex rel. Placek* v. *State of Illinois*, 546 F.2d 1298 (7th Cir. 1976) the Seventh Circuit reaffirmed *Williams*, but upheld a warning which stated that counsel would be "appointed through the court" without reference to any future event which might occur after the interrogation. The instant statement, involving exactly the same language as in *Williams*, was obtained ten years after that seminal decision in the circuit.

The Second and Fourth Circuits have refused to overturn convictions based on substantially similar *Miranda* warnings, *Massimo* v. *United States*, 463 F.2d 1171 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973); *Wright* v. *North Carolina*, 483 F.2d 405 (4th Cir. 1973), *cert. denied*, 415 U.S. 936 (1974). The Fifth and Ninth Circuit have split on the issue, both upholding and rejecting the specific language involved in this case, *compare*, *Gilpin* v. *United States*, 415 F.2d 638 (5th Cir. 1969) with *United States* v. *Lacy*, 446 F.2d 511 (5th Cir. 1971), and *United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) with *United States* v. *Noa*, 443 F.2d 144, 146 (9th Cir. 1971).

The Tenth Circuit, in reversing a conviction, noted:

> . . . we think the sentence: "we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" immediately following a statement of a present right to retained and

> appointed counsel is likely to confuse an unsophisticated mind.

Sullins v. *United States*, 389 F.2d 985, 988 fn. 2 (10th Cir. 1968). The *prior* decision relied upon by Petitioner (*Brief*, pp. 12-13), *Coyote* v. *United States*, 380 F.2d 305, 307 (10th Cir. 1967), *cert. denied*, 389 U.S. 992 (1967) was not dealing with the same type of admonitions involved in this appeal.

The First, Third, Sixth, Eighth[3], and District of Columbia Circuits have not dealt with the precise issue raised in this case.

The difference of opinion between those courts which have upheld and struck down the admonitions can be seen by comparing the decisions of two circuits faced with virtually the same language as the warnings involved here. In *Gilpin*, Judge Wisdom reviewed the rule of *Miranda*, noting that the warning must "convey to the accused that he is entitled to a government-furnished counsel here and now," 415 F.2d at 639, *quoting*, *Lathers* v. *United States*, 396 F.2d 524, 525 (5th Cir. 1968). The Fifth Circuit concluded that the contested language:

> . . . did not indicate that Gilpin had a right to have an appointed counsel *during the interrogation*. Indeed, a fair interpretation of the detective's statements is that Gilpin would be given a lawyer *only if he should go to court*. The defendant may have had the impression that a lawyer would be appointed only if he pleaded not guilty. In any event, the statement con-

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[3] The Eighth Circuit case relied upon by Petitioner, *Klinger* v. *United States*, 409 F.2d 299 (8th Cir. 1969), *cert. denied*, 396 U.S. 859 (1969) did not involve a *Miranda* warning which conditioned the right to counsel on some future event, *i.e.*, counsel would only be provided "if and when" the suspect went to court.

> veyed no notion that he was entitled to a lawyer then and there.

415 F.2d at 640-641, (original emphasis).

The contrary reasoning is found in the Second Circuit's decision in *Massimo*, again dealing with identical warnings:

> . . . Massimo was clearly warned that he could have a lawyer present *during* questioning. The only conclusion Massimo would have been justified in reaching on the basis of the warning was that, since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.

463 F.2d at 1174 (original emphasis).

While it is certainly possible to engage in an extended semantical debate over the meaning of the "if and when" warnings, "[i]t cannot seriously be maintained that the pretzel-like warnings here—intertwining, contradictory, and ambiguous as they are—gave [Respondent] 'a better understanding of his constitutional rights' than a straightforward recitation of those rights would have," *Commonwealth* v. *Johnson*, 399 A.2d at 115, *quoting*, *Commonwealth* v. *Singleton*, 439 Pa. 185, 190, 266 A.2d 753, 755 (1970). "Although there is no talismanic or heraldic abracadabra which must be fulfilled, the offer of counsel must be clarion and firm, not one of mere impressionism," *Lathers* v. *United States*, 396 F.2d at 535.

Those courts which have found that the "if and when" instruction adequately conveys to a suspect his right to counsel are seriously overestimating the intellectual sophistication and comprehension of the average individual taken into custody for questioning. All of the empirical data on this question suggest that a high percentage of

suspects who are given *correct Miranda* warnings do not understand what they have been told[4]. If suspects have difficulty understanding the correct warnings, how can they be seriously expected to understand the admonitions at issue in this case? While a judge or attorney familiar

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[4] One study found that more than 57% of all adults, and 79% of all juveniles could not entirely understand the traditional *Miranda* warnings. Significantly, the instruction *least* understood by both adults and juveniles was the right to have counsel present at the interrogation. Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif.L.R. 1134, 1152 (table) (1980). These data are discussed in greater detail in Grisso, *Juveniles' Waiver of Rights*, (St. Louis, 1981), p. 74. Another study of juveniles found that 81 of 86 of the juveniles interviewed did not consciously and fully understand their rights. Ferguson and Douglas, *A Study of Juvenile Waiver*, 7 San Diego L. R. 39, 53-54 (1970). This lack of comprehension extended to adults examined in a Denver study in which a group of suspects read or were read correct *Miranda* warnings prior to the interrogation. Only 40% of the suspects interviewed could remember both their Fifth and Sixth Amendment rights at the time of the interview, while 21% remembered only the right to remain silent, and 8% remembered the right to counsel. Leiken, *Police Interrogation in Colorado: the Implementation of Miranda*, 47 Denver L.J. 1, 14-15 (1970). In the District of Columbia 15% of eighty-five post-*Miranda* defendants failed to understand the right to silence warning, 18% failed to understand the warning of the right to presence of counsel, and 24% failed to understand the warning of the right to appointed counsel. Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1374 (1968). Nor is this lack of comprehension limited to poorly educated suspects. In a study of Yale University graduate students, interrogated by the FBI after a 1967 demonstration, only two of the twenty persons interviewed mentioned either *Miranda* or *Escobedo* spontaneously, and no one seemed to know what was involved in a waiver of rights, although each had been given the correct *Miranda* warnings by the FBI. Griffith and Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. Rev. 318 (1967).

with the requirements of *Miranda* may be able to understand the meaning of the contradictory instructions given Eagan[5], the typical person subjected to a custodial interrogation lacks the ability to understand clearly the right to counsel from the instructions given[6].

b. This Court's Decision In *Prysock* Teaches That These *Miranda* Warnings Are Invalid Because They Condition The Assistance Of Counsel On An Event Occurring After The Interrogation.

In *California* v. *Prysock*, 453 U.S. 355 (1981) the defendant was advised of his *Miranda* rights but was not specifically told of his right to have an attorney appointed before questioning. The California Court of Appeals reversed the conviction, relying on two earlier California appellate decisions, *People* v. *Bolinski*, 260 Cal.App.2d 705, 67 Cal.Rptr. 347 (1968) and *People* v. *Stewart*, 267 Cal.App. 2d 366, 73 Cal. Rptr.484 (1968).

The majority of this Court found that the warnings given Prysock were sufficiently complete to comply with *Miranda* and thus reversed the judgment of the Califor-

[5] The American Bar Association Standards provide that "[t]he offer [of counsel] should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost," ABA, *Standards of Criminal Justice*, Standard 5-7.1 (1982).

[6] One commentator has observed: "Would not the ordinary accused, under the emotional stress of recent detention by the police, be confused as to the meaning of a warning which informed him: 'that he was entitled to have an attorney with him during questioning and that one could be appointed for him, but not until he went into court, and that he could answer questions in advance of such appointment?'" Comment, *Criminal Procedure: Miranda Warning and the Right to "Instant Counsel"—A Growing Schism*, 29 Okla. L.R. 957, 965-966 (1976).

nia court. In so doing the Court cited with approval the decisions of the Ninth Circuit in *United States* v. *Garcia*, 431 F.2d 134 (9th Cir. 1970) and of the California Court of Appeals in *Bolinski*. The Court found that the results in those cases were correct because "the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation," 453 U.S. at 360.

In *Garcia* the defendant was informed that she had the right to counsel "when she answered any questions," while on another occasion she was told that "she could 'have an attorney appointed to represent [her] when [she] first appeared before the U.S. Commissioner or the Court.'" In *Bolinski* an FBI agent[7] informed the defendant that he had the right to counsel "if he was charged," which would be provided at no cost to him if he was unable to afford counsel.

In *Prysock* this Court also approved of the reasoning of the Ninth Circuit in *United States* v. *Noa*, 443 F.2d 144 (9th Cir. 1971) wherein the defendant was given the standard *Miranda* admonitions with the additional advisement that if Noa could not afford counsel "one will be appointed for you if you wish." The Ninth Circuit upheld these instructions, and distinguished the case from *Garcia*, pointing out that in *Garcia* the right to counsel was linked to a future event (appearance before the Commissioner or court), while in *Noa* no such future event was suggested, only that counsel would be appointed. In both *Garcia* and *Noa* the Court of Appeals cited the Fifth

[7] The Federal Bureau of Investigation stopped using the "if and when" warnings sometime in 1968 or 1969, *see United States* v. *Cassell*, 452 F.2d 533, 541, fn. 8 (7th Cir. 1971).

Circuit's decision in *Gilpin* as indicative of the type of warnings which did not comply with *Miranda*. The warnings in *Gilpin* were *identical* to those given Eagan, *see*, 415 F.2d at 639.

Prysock requires that the judgment of the Seventh Circuit be affirmed. Without question the warnings given Eagan linked his right to counsel on his future ("if and when") appearance in court. To hold otherwise is to do violence to the straight-forward meaning of the words spoken by the officers prior to Eagan's first statement. Significantly, Petitioner does not even cite *Prysock* in his brief, while the *Amicus* Brief (p. 18) attempts to draw a distinction between those warnings which "link the appointment of counsel to a future event occurring after interrogation" which are not proper, and those which "simply link the appointment of counsel to some future event" which are valid.

A review of *Prysock* itself, as well as those cases cited therein and decided thereafter, demonstrate the defect in the warnings given Eagan was that they clearly connected his ability to obtain counsel to something which would occur after the interrogation. The exquisite distinction in language suggested by the Solicitor General to save these admonitions finds support in none of the cases deciding this issue. Just as in *Bolinski*, *Garcia*, and *Gilpin*, here Eagan was told he could not obtain the services of an attorney until and unless he appeared in court. Indeed, inclusion of the word "if" in the instructions clearly means that Eagan had no right to an attorney at the time of the interrogation, but that such right was conditioned on his case coming to court.

Of particular interest is a post-*Prysock* cases dealing with this issue, *United States* v. *Contreras*, 667 F.2d 976

(11th Cir. 1982), *cert. denied*, 459 U.S. 849 (1982). Petitioner contends (*Petitioner's Brief*, p. 13) that *Contreras* is contrary to the decision of the Court of Appeals in this case. A complete reading of the decision, however, reveals that it supports the action of the Seventh Circuit. In *Contreras* the accused was informed only that counsel would be appointed by the court. The Eleventh Circuit considered the impact of this Court's decision in *Prysock* on *Miranda* warnings which informed the defendant that counsel would have to be appointed by the court. On page 13 of the Petitioner's Brief the State quotes some of the Eleventh Circuit's reasoning. Immediately following the quoted language, however, the court said:

> *Prysock* thus stands for the proposition that a *Miranda* warning is adequate if it fully informs the accused of his right to consult with counsel prior to questioning and *does not condition the right to appointed counsel on some future event*. (emphasis added)

667 F.2d at 979. Following this observation is a footnote which gives as examples of *improper* warnings a statement that counsel would be available "if" the suspect went to court, *citing*, *Garcia*, *Gilpin*, and *Bolinski*, 667 F.2d at 979, fn. 5. It is thus apparent that the Eleventh Circuit would find the instant warnings to be conditional and, thus, invalid.

Further support for Respondent's position is found in the Minnesota Court of Appeals decision in *State* v. *McBroom*, 394 N.W.2d 806 (Minn.App. 1986) wherein the defendant was told of his right to have a lawyer with him during any questioning and, if he could not afford counsel, one would be appointed by a judge "if you appear in court," 394 N.W.2d at 812. Citing *Prysock* and *Garcia*, the Minnesota Court found that the words "if you appear

in court" linked the right to counsel to some future event after the police interrogation, and thus the warning was not proper.

In *De La Rosa* v. *Texas*, 743 F.2d 299 (5th Cir. 1984), *cert. denied*, 470 U.S. 1065 (1985) the suspect was told that although "it will take some time" before a lawyer would be appointed, "the court will appoint a lawyer for you free of charge now or at any other time," 743 F.2d at 302. The Fifth Circuit found that the language of the warning made clear to De La Rosa that he had the right to counsel before he said a word. The Court distinguished *De La Rosa* from *Gilpin* where, as noted above, the instructions were identical to those in this case. In *Gilpin* the right to counsel was linked to a future event, while in *De La Rosa* the defendant was clearly informed of his right to have counsel appointed prior to the interrogation.

These cases stand for the proposition[8] that a *Miranda* warning which informs a suspect that counsel can not be provided unless ("if") some event occurs in the future are invalid. Contrary to the assertion of the Solicitor General, in *Prysock* this Court concluded that it is improper to tell a suspect in custody, immediately prior to an interrogation, that counsel can not be provided until he appears in court. Moreover, the conditional right to counsel indicated by the use of the word "if" manifestly fails to inform the

[8] The Solicitor General argues (*Amicus* Brief, pp. 9-11) that since the warnings given the Petitioner "touched all points required by the *Miranda* decision," such admonitions were proper. As the foregoing argument makes clear, in *Prysock* this Court explicitly found that otherwise proper warnings were rendered invalid by conditioning the right to counsel on an event which would occur after the interrogation. By limiting the right to counsel in this way the warnings "did not fully advise the suspect of his right to appointed counsel before such interrogation," 453 U.S. at 360.

suspect of a right to publicly compensated counsel at the interrogation[9], prior to the appearance in court. Respondent submits that under the clear application of *Prysock*, the warnings given to Eagan before his first statement did not comply with *Miranda* and were invalid.

C. Respondent Advocates Neither A Right To "Instant Counsel" Nor "Counsel On Call", But The Jurisdiction Must Have Some Procedure For Complying With *Miranda*.

It is entirely proper under *Miranda* for a jurisdiction to require a court to appoint counsel to represent a suspect at a custodial interrogation. The Seventh Circuit's decision in *Placek*, as well as the post-*Prysock* decisions of the Eleventh and Fifth Circuits in *Contreras* and *De La Rosa*, all are examples of cases in which the *Miranda* warnings were upheld, notwithstanding the fact that the accused was told that counsel could only be provided by court appointment. The problem is not the manner in which counsel is provided, but whether the suspect is informed of his ability to obtain counsel at the time of the interrogation.

It is not accurate to portray Respondent's argument as a demand for "instant counsel" as suggested by Judge Coffey, dissenting in the Court below (J.A. 22) and by the Solicitor General (*Amicus* Brief, p. 12), *citing Mayzak* v. *United States*, 402 F.2d 152, 155 (5th Cir. 1968). Respondent does not suggest that every police station have an attorney "on call" to provide representation at interroga-

[9] The Government acknowledges that the warning given to Eagan meant that he only had the right to counsel if charges were filed against him (*Amicus* Brief, p. 14). This warning, therefore, violates the explicit command of *Miranda* as well the rule established by *Prysock*.

tions. Each jurisdiction must decide how to implement *Miranda* in a manner which meets the unique needs of the state or community. Obviously, if counsel is requested, there will be some delay in getting the lawyer to the location of the interrogation, whether that be private counsel or a publicly compensated attorney. There is no *Miranda* violation when police inform the suspect that there will be a short delay in getting counsel to the station house, *People* v. *Evans*, 125 Ill.2d 50, ___, N.E.2d ___ (1988) No. 60705 (Ill. Sup. Ct. Sept. 29, 1988)

In Wisconsin, a jurisdiction with a statewide public defender program, there are specific administrative regulations which specify a procedure for providing counsel to an indigent at any time, whether that be a private lawyer or a staff public defender, Wis. Admin. Code § SPD 2.02(2) (1984)[10]. Prior to the creation of the statewide public defender program in Wisconsin, the local bar association in some communities prepared lists of attorneys who would represent indigent suspects at the interrogation stage, Milner, *The Court and Local Law Enforcement*, (Beverly Hills, 1971), pp. 213-214.

Indeed, contrary to the assertion found at page 12 of the *Amicus Brief*, in several jurisdictions the law enforcement officer has the ability—in some cases, the obligation—to obtain counsel for an indigent who invokes his right in a custodial interrogation. In Florida if an indigent suspect requests counsel, the officer "shall immediately and effectively place said defendant in communication with the (office of) Public Defender of the circuit in which

[10] The regulation provides:

> In any emergency situation, the representative of the state public defender shall assign the attorney most readily available to handle the emergency situation, whether that attorney is a staff public defender or private attorney.

the arrest was made," Rule 3.111(c)(2), Florida Rules of Criminal Procedure. In Vermont state law places the obligation on the law enforcement officer to notify the appropriate public defender if an indigent is in custody and does not waive counsel, Vt. Stat. Ann. tit. 13, § 5234(a)(2) (1988), while a Wyoming statute specifies that "[i]f the person being interrogated does not have an attorney and wishes to have the services of an attorney, he shall be provided the opportunity to contact the nearest public defender," Wyo. Stat. § 7A-6-105(a) (1987). North Carolina has a similar statute, N.C. Gen. Stat. § 7-353(c) (1986), placing the responsibility on the authority having custody of a suspect to notify either the public defender or court if the indigent requests counsel. In Alaska and Idaho the law enforcement officers are required to notify the public defender or court if someone is in custody who is not represented by counsel, Alaska Stat, § 18.85.110 (a)(2); Idaho Code § 19-853(a)(2) (1987). New Mexico law requires that the peace officer shall notify the district public defender of any person not represented by counsel who is in custody and is either charged with or under suspicion of the commission of a crime, N.M. Stat. Ann. § 31-15-12C (1978).

In the District of Columbia members of the bar volunteered for station-house duty to assist in assuring compliance with *Miranda*, Medalie et al., *Custodial Police Interrogation in our Nation's Capital: the Attempt to Implement Miranda*, 66 Mich. L. Rev. at 1380-1381. In Denver suspects who request counsel, but have no funds to retain an attorney, are allowed to call the public defender, Leiken, *Police Interrogation in Colorado: the Implementation of Miranda*, 47 Denver L. J. at 10. In Chicago if an indigent suspect indicates a desire to consult with an attorney, the police will halt the interrogation and

call the public defender, *see*, *People* v. *Evans*, *supra*. The California Supreme Court has recognized that although a court has the authority to determine indigency and appoint counsel, a public defender has the obligation to provide counsel to an indigent suspect at a custodial interrogation, even without the appointment of the court, *Ingram* v. *Justice Court for Lake Valley Jud. Dist.*, 73 Cal.Rptr. 410, 447 P.2d 650, 653 (1968).

In the federal system counsel is appointed by the Court, and pursuant to Rule 5(a), Federal Rules of Criminal Procedure, that appointment may come before the indictment or information is filed. The Criminal Justice Act, 18 U.S.C. §3006(a)(1), explicitly provides for the appointment of counsel prior to the filing of any pleadings, including counsel for the purpose of representing a suspect at a custodial interrogation, *Jett* v. *Castaneda*, 578 F.2d 842, 844 (9th Cir. 1978). In fact, the statute allows retroactive appointment of counsel to cover any representation provided prior to court appointment, 18 U.S.C. §3006(b).

None of these systems is specifically mandated by the Constitution[11], but each is a proper scheme to fulfill the mandate of *Miranda*[12].

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[11] The A.B.A. Standards recommend that: "At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer." ABA *Standards for Criminal Justice*, Standard 5-7.1.

[12] The importance of providing legal counsel as early in the case as possible is discussed in *Guidelines for Legal Defense Systems in the United States*, (National Legal Aid and Defender Association, 1976), Chapter 4, pp. 48-71.

The problem in this case is not that Indiana law and procedure require the appointment of counsel by the court, but that Indiana apparently has no procedure for securing counsel prior to the filing of a formal indictment or information, *see Amicus Brief*, p. 14, fn. 9. Thus, twenty-two years after the *Miranda* decision, the State of Indiana has no mechanism for providing counsel if an indigent suspect indicates his desire to consult with an attorney before submitting to questioning. As demonstrated above, there are many methods of complying with *Miranda*, from traditional court appointment, to statewide public defender systems, to private bar sponsored programs. Indiana provides none of these alternatives. Counsel is simply not provided.

This lack of any means to comply with *Miranda* places law enforcement officials in the untenable position of having to tell suspects that although they have the right to have an attorney present at the interrogation, there is no way to provide such a lawyer under Indiana law. It is no answer to say, as suggested by *Amicus (Brief*, pp. 12-13), that the instant warnings are acceptable because the police did nothing more than explain the Indiana procedure. An accurate description of a constitutionally deficient procedure does not make the procedure proper.

In Indiana law enforcement officials are unable to comply with *Miranda* by providing counsel to indigent suspects during custodial interrogation. As a consequence, the warnings afforded Eagan were fatally flawed as they expressly denied his right to have counsel present at the questioning and conditioned the provision of a lawyer on an event occurring after the interrogation. The Seventh Circuit properly directed that the first statement be suppressed.

II THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO THE DISTRICT COURT FOR DETERMINATION OF WHETHER THE RESPONDENT KNOWINGLY WAIVED HIS RIGHT TO COUNSEL PRIOR TO THE SECOND STATEMENT.

After giving the first statement, Respondent was held in police custody until the following afternoon. After 4:00 p.m. on May 18, 1982—approximately 29 hours after the first statement—Respondent confessed to hitting Ms. Williams on the head with a brick and stabbing her. Before giving this statement, Eagan was given a different set of *Miranda* than preceded his first questioning.

The Court of Appeals remanded the case to the District Court for determination of whether Respondent gave the second statement after a knowing and voluntary waiver of his constitutional rights (J.A. 9). Respondent submits that given the meager record properly before the Court and the inadequacies in both the first and second *Miranda* warnings, the decision to remand this case for additional findings must be affirmed.

A. Remand Is Appropriate So The District Court Can Properly Consider The Transcript Of The State Suppression Hearing Which Is Not Now Properly Part Of The Court Record.

A hearing on Respondent's motion to suppress his confessions was held in the Superior Court of Lake County, Indiana on November 19, 1982. The transcript of this hearing was not prepared until five years later, November 4, 1987 (J.A. 127), more than five months after this case was argued in the Seventh Circuit. The transcript was obviously never considered by either the Indiana Supreme Court or the District Court. It was never part of the District Court record at all. Moreover, the transcript was never properly made part of the record in the Court of

Appeals. Respondent submits that under these circumstances the purported suppression hearing transcript (J.A. 95-129) is not properly before this Court.

Prior to the appearance of this transcript the only indication in this record of the suppression hearing and its disposition was a one sentence minute order found at page 39 of the State Court Record. That order stated: "Evidence is heard and Arguments are had, and the Court being duly advised, now denies Motions to Suppress." It was on the basis of this record and the evidence adduced at trial that both the Indiana Supreme Court and the District Court denied relief to Respondent.

Respondent was provided no notice that the record had been supplemented by this transcript, nor was he provided a copy of the transcript until after this Court granted certiorari. His first knowledge of the existence of this document was when he read Judge Coffey's dissenting opinion which makes reference to such transcript (J.A. 10, fn. 1). The Court of Appeals issued no orders on this matter, the Petitioner never moved to supplement the record on appeal, and Respondent was never afforded the opportunity to object to the supplementation of the record with a transcript which had never been considered by either the state appellate court or the District Court.

Rule 10(e) of the Federal Rules of Appellate Procedure allows the Court of Appeals to correct an omission or misstatement in the record on appeal, but "the court of appeals may not admit on appeal a document that is not made part of the record in the district court," 9 *Moore's Federal Practice*, ¶ 210.08[2], p. 10-61. In this case it is not clear exactly how this transcript was added to the record on appeal, if it was. Judge Coffey's footnote says that ". . . with the aid and urging of this court's clerk, we have

recently been provided with the suppression hearing transcript" (J.A. 10, fn. 1). Petitioner's Brief indicates that this transcript was "submitted as a supplement to the record at the Circuit Court's (sic) request," *Petitioner's Brief*, p. 15. So far as Respondent knows, the record on appeal was never supplemented. No order was ever issued by the Seventh Circuit supplementing the record, and Respondent was never given notice of either the filing or nature of the supplementation. The majority of the Seventh Circuit panel made no reference to this transcript. In fact, Chief Judge Bauer, writing for the panel, noted the inadequacy of the record on this specific point (J.A. 9). The Seventh Circuit has construed Rule 10(e) to forbid the supplementation of a record on appeal with documents "which neither were introduced into evidence nor, in any manner, made a part of the record in the District Court," *United States ex rel. Kellogg* v. *McBee*, 452 F.2d 134, 137 (7th Cir. 1971); *Borden, Inc.* v. *F.T.C.*, 495 F.2d 785, 788 (7th Cir. 1974), *see also Stearns* v. *Consolidated Management, Inc.*, 747 F.2d 1105, 1116, fn. 1, (7th Cir. 1984) (Coffey, J., dissenting). Respondent submits that this document was never part of the original record on appeal and was never properly made part of the record. It should not be considered here[13].

[13] In *Dickerson* v. *Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982) the Court of Appeals in a § 2254 habeas corpus case did consider a portion of the state criminal court record which was not before the district court. *Dickerson* arises in a very different factual setting than does this case. In *Dickerson* the state objected to the Eleventh Circuit considering a portion of the state trial transcript which the attorney for the state had failed to make part of the record in the district court. The attorney for the prisoner relied on the missing transcript in his brief on appeal. The missing transcript had been before the state appellate court when reviewing Dickerson's conviction, and the Court of Appeals issued a formal order directing the submission of the transcript. Most importantly, in *Dickerson* the issue considered by the Court of Appeals was strictly a legal issue, while here a mixed question of law and fact is presented, *United States* v. *Yunis*, 859 F.2d 953, 958 (D.C. Cir. 1988); *Terrovona* v. *Kincheloe*, 852 F.2d 424, 428 (9th Cir. 1988).

This Court made clear long ago that an appellate court "can act on no evidence which was not before the court below, or receive any paper that was not used" in the lower court, *Boone* v. *Chiles*, 35 U.S. (10 Pet.) 177, 208 (1836). This concept is embodied in Rule 10(e), F.R.A.P. which allows supplementation of the record on appeal, but "does not grant a license to build a new record," *Anthony* v. *United States*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982). Under Rule 10(e) it is improper to allow a party to supplement the record of the district court with documents never considered in the trial court, *Fassett* v. *Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 2463, 95 L.Ed.2d 872 (1987); *Karmun* v. *Commissioner of Internal Revenue*, 749 F.2d 567, 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

The apparent availability of the suppression hearing transcript is further basis to affirm the judgment of the Court of Appeals remanding this case to the District Court for a determination "of whether the defendant knowingly and intelligently waived his right to the presence of an attorney during the second interrogation" (J.A. 9). The District Court is required to consider all of the facts and circumstances surrounding the confession to ascertain whether the waiver of rights was knowing and voluntary, *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981). This newly available transcript should be considered by the District Court along with all other evidence in consid-

ering whether Eagan properly understood and waived his right to counsel before the second statement.

B. The Warnings Given Respondent Prior To His Second Statement Were Themselves Defective.

The warnings provided Respondent prior to the second statement did not inform him of his right to have publicly compensated counsel with him during the interrogation. Although Respondent recognizes that in *Prysock* this Court held that warnings which failed to inform the suspect of his right to the services of a free attorney before and during questioning were nevertheless adequate to comply with *Miranda*, the admonitions prior to Respondent's second statement deviated substantially from those approved in *Prysock* and are so ambiguous and disjointed as to fail to convey to Respondent a proper understanding of his *Miranda* rights.

The second *Miranda* warnings provided Respondent were divided into five paragraphs (J.A. 141-142):

> 1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
>
> 2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
>
> 3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
>
> 4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.

> 5. That if I cannot hire an attorney, one will be provided for me.

Respondent submits that the juxtaposition of the words "of my own choice" with information about the right to an attorney in paragraph two garbles the warnings to such a degree as to violate *Miranda*[14]. Moreover, the structure of these warnings obfuscates Respondent's right to a free lawyer during the interrogation. Paragraphs two and three of the warnings deal with the right to counsel at the interrogation. Not only do these paragraphs not inform the suspect of his right to a publicly compensated attorney during the questioning, the statement that the individual has the right to an attorney of his "own choice" clearly suggests that he would have to obtain his own attorney for the interrogation and one would *not* be provided. Paragraph four describes the right to discontinue the interrogation, with no mention of the right to counsel. The only advise regarding a free attorney is found in the fifth paragraph. This information makes no reference to the provision of counsel during the interrogation, but simply says "if I cannot hire an attorney, one will be provided for me."

Respondent acknowledges that both the Indiana Supreme Court and the United States Court of Appeals

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[14] Unlike the "if and when" *Miranda* warnings which have been the subject of extensive litigation in all parts of the country, the second set of warnings appear to be unique to Lake County, Indiana, *see*, *Richardson* v. *Duckworth*, 834 F.2d 1366 (7th Cir. 1987); *Maxwell* v. *State*, 408 N.E.2d 158 (Ind. App. 1980); *Jefferson* v. *State*, 399 N.E.2d 816 (Ind. App. 1980); *Robinson* v. *State*, 272 Ind. 312, 397 N.E.2d 956 (1979); *Gutierrez* v. *State*, 270 Ind. 639, 388 N.E.2d 520 (1979); *Grimes* v. *State*, 170 Ind.App. 525, 353 N.E.2d 500 (1976); *Sotelo* v. *State*, 264 Ind. 298, 342 N.E.2d 844 (1976); *Holguin* v. *State*, 256 Ind. 371, 269 N.E.2d 159 (1971).

for the Seventh Circuit have upheld these specific warnings, *Robinson* v. *State*, *supra.*; *Richardson* v. *Duckworth*, *supra*. Nevertheless he submits that even without reference to the earlier warnings, the second admonitions failed to comply with *Miranda*. In *Sotelo* v. *State*, Justice DeBruler, concurring, found that the Lake County warnings "do not clearly tell the person about to be questioned that if he has no money to hire a lawyer, one would be provided for him prior to any questioning," 342 N.E.2d at 851 (DeBruler, J., concurring). Adopting the reasoning of Sotelo's counsel, Justice DeBruler explained why the format of these warnings results in the failure to inform a suspect of the right to free counsel at the interrogation:

> Part of this deliberately calculated effect was achieved by adding the words "attorney of your own choice" to the first part of the advisement form. This would mean to many that they could have an attorney of their own choice to consult with them before they made a statement, just as it reads on the Lake County Waiver Form, but that this only applies to an attorney of their own choice, assuming they could afford one.

Justice DeBruler then noted that the information about the right to have an attorney provided is separated from the right to counsel at the interrogation by two paragraphs which would "naturally lead a person to believe that he may have an attorney appointed for him some time in the future, and not prior to the interrogation," *id.*

Respondent asserts that the second warnings are defective on their face and his second statement should have been suppressed for this reason. At the very least, the defect in the second admonitions is sufficient to require the District Court to determine whether Eagan actually understood and knowingly waived his right to counsel prior to making the incriminating statement.

C. Notwithstanding This Court's Decision In *Elstad*, Respondent's Confession Was Not Admissible.

1. The Second Statement Is Not Admissible Because The Second *Miranda* Warnings Were Not "Careful And Thorough" As Required In *Elstad*.

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985) the Court held that a statement obtained after "a careful and thorough administration of *Miranda* warnings" (470 U.S. at 310-311) was admissible, notwithstanding the fact that an earlier statement was obtained by the police without administration of *Miranda* warnings. In this case both Petitioner and *Amicus* argue that under *Elstad* the second statement given by Respondent was admissible, even if the initial statement was properly excluded because of the defect in the first set of admonitions. Respondent submits that *Elstad* can not save the second statement.

Underlying this Court's decision in *Elstad* was the uncontested fact that Elstad was given entirely correct *Miranda* warnings before providing the second statement. Thus much of Justice O'Connor's opinion for the Court dealt with the question of whether the second statement was somehow compelled by the first, non-Mirandized, statement. The majority of the Court found that the second statement was untainted and thus admissible.

In so doing, the Court emphasized that the warnings ultimately given to Elstad were "careful and thorough" (470 U.S. at 310), "undeniably complete" (470 U.S. at 314), and "clear and comprehensive" (470 U.S. at 315, fn. 4). It is apparent from the repeated emphasis on the scope and nature of the warnings given to Elstad before his second statement that the content of the warnings was important in deciding that the second statement was voluntary and not tainted by the first confession. This is

because "[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will,'" 470 U.S. at 311, *quoting*, *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963).

In the instant case the second *Miranda* warnings were anything but careful, thorough, complete, clear or comprehensive. The warnings were garbled, ambiguous, and unclear on the critical question of Respondent's right to free counsel at the time of his interrogation. While in *Elstad* the Court had no difficulty in finding the second statement admissible, following an understanding waiver of constitutional rights, no such conclusion can be reached in this case.

In neither the first nor second warnings was Eagan ever informed of his right to provided counsel at the interrogation. In the first warnings he was affirmatively told that the right to free counsel attached only when his case went to court. The second warnings, while not specifically saying that Respondent could only obtain counsel after the interrogation, were so structured as to obscure his right to free counsel before and during the questioning. The rule of *Elstad* is that once a defendant has given a statement which violates *Miranda* a subsequent confession may be admitted if the suspect "has been given the requisite *Miranda* warnings" 470 U.S. at 318. Here Eagan was not given the type of warnings referred to in *Elstad*, and as a consequence his second statement is not admissible.

2. The Combination Of The Two Sets Of *Miranda* Warnings Warrants At Least A Remand To The District Court, If Not Outright Vacation Of Respondent's Conviction.

Within a 29 hour period Respondent was given two sets of *Miranda* warnings by the Hammond police. The first

set of warnings indicated that counsel could not be provided until after the interrogation, while the second warnings failed to inform Eagan that he had the right to free counsel prior to and during the interrogation. Respondent submits that the combined effect of the two sets of warnings was to fail to provide him a clear statement of his right to an attorney, supplied by the state, before and during the questioning.

The case is similar to, but stronger than, *Gilpin* v. *United States*, *supra*. In *Gilpin* the defendant gave several statements. The first was preceded by exactly the same warnings as were provided Eagan before his initial statement. The result was suppression of the first statement. Gilpin was subsequently given "adequate *Miranda* warnings" (415 F.2d at 641) before his second confession. Nevertheless, the Fifth Circuit found that the second statement was not admissible because the second set of warnings were "given in a perfunctory manner without the slightest hint that it contained any information different from the one preceding it," 415 F.2d at 642. In the instant appeal, the second set of *Miranda* warnings was not "adequate". In fact, the second warnings were incomplete in the same area the first warnings were incorrect—the right to free counsel before and during the interrogation. In the first set of warnings Respondent's right to counsel was misstated, and, as noted by the Court of Appeals, "[t]he second warning did not explicitly correct this misinformation" (J.A. 9). Thus while the defendant in *Gilpin* was ultimately given warnings which informed him of the right to counsel at the interrogation, such warnings were never provided Eagan.

In *Elstad* the defendant first gave a statement without being informed to his *Miranda* rights. Later that same day, after a complete set of warnings, he gave a statement which this Court found admissible. In this case what the

police did was worse than had they given Eagan no warnings at all before his first statement. The initial admonitions materially misstated his right to counsel, and this misstatement was never corrected. Before the second statement could be admissible, the police at least had to correct the information given the day before that counsel could be provided only if and when his case came to court.

Had Eagan been given the standard *Miranda* warnings before his second statement, this would be a closer case. Neither of the warnings given Eagan were standard, both deviated from the traditional admonitions and substantially misstated Eagan's right to counsel. Contrary to the assertion of the Petitioner and *Amicus*, Respondent was never given the "fully effective equivalent" of correct and complete warnings, *Miranda*, 384 U.S. at 476. Given the fact that the two statements come but one day apart, the police were obligated under these facts, at a minimum, to fully comply with *Miranda* and inform Eagan that he had the right to free counsel at the interrogation. They never did that.

The only relief granted by the Seventh Circuit was to remand the case to the District Court to determine whether, given the two warnings, Eagan understood his right to counsel and knowingly and intelligently waived his constitutional right to have counsel before and during the interrogation. On the facts here, given the lack of a state court record, given that neither set of warnings was complete, given that Respondent was never informed of his right to have an attorney provided at the interrogation, and given the obligation of the court to consider all of the facts and circumstances surrounding the confession, the relief granted by the court below was quite modest. Respondent urges the Court to affirm that action.

CONCLUSION

For the reasons set forth herein, Respondent respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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